Supreme Court, U.S.
FILED

931234 JAN 31 1994

OFFICE OF THE CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER, 1993 TERM

CHARLES K. MONIN, JR., INDIVIDUALLY
AND AS CO-EXECUTOR PETITIONER

vs.

JOSEPH E. MONIN AND PAUL MONIN, INDIVIDUALLY AND AS CO-EXECUTORS, THOMAS RAPHAEL MONIN, MARTHA WHEELER, WILLIAM MONIN, CAROLYN BACKHERMS, LINDY ROBY,, DONALD MONIN, MONIN INC., SONNY MONIN, INC., JAMES ALVIN MONIN, THE ESTATE OF CHARLES K. MONIN, SR., DECEASED, THE ESTATE OF THELMA MONIN, DECEASED, CHALLEN P. MCCOY, MCCOY & SEAY, JOHN DOUGLAS HUBBARD, FULTON HUBBARD & HUBBARD, JOHN SALTSMAN, SALTSMAN & WILLETT, JOHN S. KELLEY, KELLEY & KELLEY, HANDMAKER & SEILER, TERRY HAWKINS, BEN HAYDON, MR. & MS. J. C. GREENWELL, BROWN, TODD & HEYBURN, BILL BROWN, AND THEIR ASSIGNS, SUCCESSORS, PARTNERS AND PROFESSIONAL FIRMS, AND HONORABLE LARRY RAIKES OF NELSON CIRCUIT COURT, COMMONWEALTH OF KENTUCKY

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

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Pewee Valley, Ky. 40056
(502) 241-4072
Counsel of Record for Petitioner

45pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not the State trial court abused its discretion or denied the Petitioner due process and his right to counsel by failing to give the Petitioner notice and any fair opportunity to be fully heard in response to contempt proceedings or in mitigation of the Contempt Orders of the State Court; and

(2) Whether or not a State Judge has the power to enter an Order that compels a party to act contrary to federal law.

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OPINIONS BY APPELLATE COURTS

The Opinions, Orders and Judgments of the Appellate Courts of the Commonwealth of Kentucky appended hereto are as follows:

(1) Order denying discretionary review by the Supreme Court of Kentucky entered November 17, 1993.

(2) Opinion and Order of the Court of Appeals of the Commonwealth of Kentucky entered July 2, 1993.

JURISDICTIONAL GROUNDS OF THIS COURT

The Order denying discretionary review entered November 17, 1993 by the Supreme Court of Kentucky in reviewing the Order and Opinion of the Court of Appeals of Kentucky entered July 2, 1993, is sought to be reviewed by the Petitioner. This Court has jurisdiction to review the aforesaid Judgments by Writ of Certiorari pursuant to Title 28 U.S. Code 1257(3) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a

decision could be had, may be reviewed by the Supreme Court as follows: ...(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of a commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS

This Petition arises under the following provisions of the Constitution of the United States:

Due Process Clauses

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A., Const., Amend. 5

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
U.S.C.A., Const., Amend. 14, Sec. 1

Right to Counsel
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."
U.S.C.A., Const., Amend. 6

Supremacy Clause
"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
U.S.C.A., Const., Article VI, Cl. 2

STATEMENT OF THE CASE

In the last ten years, the Monin family of Bardstown, Kentucky has been involved in litigation consisting of two probate matters, the estates of their parents and five civil suits. On the 3rd day of February, 1991, the parties entered into a Settlement Agreement to resolve all pending litigation, including legal and related costs.

After the Petitioner executed the Settlement Agreement, he was restored as a co-executor of his father's estate and was given access to all of the estate documents. At that time, he discovered a 1987 appraisal of the major asset of the estate, real estate owned by a family corporation known as Monin, Inc., in the amount of $800,279.00, which was in the possession of and known to prior co-executors, Paul and Joseph Monin. The fair market value of this asset was estimated at over $1,000,000 in 1991.

Despite the 1987 appraisal, co-executors Paul and Joseph Monin filed a Kentucky Inheritance Return based on their valuation of the estate's interest in the sum of $212,380.45. They failed to file a Federal Estate Tax Return. Their position is that their valuation of a 49% minority interest in the stock of a closely held family corporation was appropriate. Fifty One percent of the stock is already owned by the Petitioner, who is the President of Monin, Inc.

At the request of the Petitioner, a noted tax attorney reviewed the estates and advised the Petitioner that under the rules and criteria permitting the devaluation of closely held assets that the valuation by the prior co-executors, based on the 1987 appraisal alone, was significantly under-valued and that a Federal Estate Tax Return was required to be filed. The tax attorney advised the Petitioner that he was personally liable, as an heir and as a co-executor for any taxes owed, penalties

and interest. Furthermore, criminal statutes pertaining to violations of Federal Tax Law may apply. If the Petitioner had known about the tax issues, he would not have entered into the Settlement Agreement.

When the Petitioner made efforts to renegotiate the Settlement Agreement and resolve the tax issues, he met with resistance by the Respondents. Therefore, the Petitioner refused to participate in transferring the stock of Monin, Inc. to carry out the Settlement Agreement.

When these issues could not be resolved between the parties, the Respondents moved for an Order of Compliance which was granted by the Honorable Judge Larry Raikes, Nelson Circuit Court, entered December 23, 1991 requiring all parties "to comply and to do all things necessary to carry out the Settlement Agreement of February 3, 1991 within thirty (30) days. Any party failing to do any and all things necessary and incidental in carrying out said

Agreement in the above time or any time thereafter shall be held in contempt of Court upon any party seeking a rule against the offending person."

The Trial Court added that any "willful violation" would result in the violator going to jail because the Court was "tired of messing with it." When counsel for the Petitioner advised the Court that the Petitioner was concerned about federal estate civil and criminal tax liability, the Court's response was while it would "not prejudge the reasons" anyone violating the Order would be "taking their chances." The Court concluded by adding that anyone who willfully violated the Order was entitled to a Show Cause hearing. The Court did not give the Petitioner any opportunity to be fully heard or present evidence.

After further negotiations between the Petitioner and the Respondents failed to resolve the pending questions, the Respondents

moved for a Order to hold the Petitioner in contempt for failing to transfer the stock under the Order of Compliance entered in December, 1991.

At the time the hearing was requested, counsel for all parties requested that the Court enter an Order mandating the personal appearance of the Petitioner and Don Monin, a resident of Alabama, at the scheduled Show Cause Hearing. On the record, it was agreed between all counsel and the Court, that the Petitioner and Don Monin would be notified by the Clerk, by mail. This Order was signed on the 20th day of March and entered on the 25th day of March, 1992, two days before the scheduled March 27, 1992 hearing. There is no indication in the record anywhere that this Order was mailed or otherwise served upon the Petitioner or Don Monin, or that they were notified of its existence.

As a result, neither the Petitioner nor Donald Monin attended the hearing. Although the Petitioner intended to attend the hearing, it was not expected that he would testify and that his counsel of record would present evidence on behalf of the Petitioner in response to the contempt proceedings. A last minute business problem called the Petitioner to Louisville, Kentucky at the time of the hearing.

During the cross-examination of the Respondents' first witness, the Court interrupted counsel and truncated the hearing when he learned that the Petitioner was not present. The Court inquired whether or not the Petitioner knew about the hearing and counsel stated he did, but that he did not represent the Petitioner personally but only in his capacity as a co-executor of the estate and that it was his impression that the Petitioner would be served with process or otherwise notified of the requirement that he personally appear before the Court. The Court responded

by immediately stating that it would sign an Order for the Petitioner's arrest making no reference to Don Monin who was also not present. When the Court interrupted cross-examination by counsel, the Trial Judge commented that we have "been over this before" and the Petitioner had ample opportunity to contest the matter and the tax situation was known to him at the time he entered the Order of Compliance in December of 1991. The hearing was summarily terminated without giving the Petitioner any opportunity to present any evidence whatsoever and denying counsel for the Petitioner the full and fair opportunity to finish his cross-examination of any witnesses or challenge any evidence to be offered by the Respondents. The Order entered on March 27, 1992 holding the Petitioner in contempt, speaks for itself:

> "This cause coming on for hearing on this date and Charles K. Monin, Jr. not present, and it appearing from the testimony that he had actual knowledge of this hearing at the time

> and on this date, and that the Court had heretofore orally and by Order requiring the carrying of all things necessary to affect the Settlement Agreement heretofore made February 3, 1991 and Mr. Charles K. Monin, Jr. not present and he had no reason for his failure to do so HE IS HEREBY HELD IN CONTEMPT OF COURT."

The Sheriff of Nelson County was also ordered to arrest and incarcerate the Petitioner for a period of thirty days or until he purged the contempt by doing what was necessary to carry out the Settlement Agreement. On March 30, 1992, the Trial Court entered an Order entitled "Supplemental Order" which reiterated that the Petitioner was subject to arrest and incarceration for thirty days unless he complied with the Settlement Agreement and added a denial of bond.

Under Civil Rule 59 of the Kentucky Rules of Civil Procedure, counsel for the Petitioner served the other parties with a Motion to set aside the Contempt Orders and provide the Petitioner with a full hearing in response to the contempt proceedings and in mitigation of

the same, which was served one day late under the ten day time limit of Civil Rule 59 based on the March 27, 1992 Contempt Order. No one objected on those grounds when the Motion was heard on May 6, 1992. The Court summarily denied the Motion commenting that the Petitioner "was hiding out and avoiding the Order and so there's no way I'm going to set it aside." The Civil Rule 59 Motion was timely served, based on the March 30, 1992 Contempt Order.

In addition to grounds for a new trial, Civil Rule 59 of the Kentucky Rules of Civil Procedure entertains a motion to alter or amend a judgment or vacate the same and further provides for a new trial or reopening of a Judgment with the taking of additional proof and amending the same on any action tried without a jury.

On June 12, 1992 the first Notice of Appeal to the Court of Appeals of the Commonwealth of Kentucky was filed within the

thirty day time period set out under Civil Rule 73.02 based on the May 13, 1992 Clerk's notation as recognized in the Opinion of the Court of Appeals. An immediate Stay of the Contempt Order was granted on the 1st day of July, 1992 and an Intermediate Stay was granted on the 31st day of August, 1992.

In an effort to get the Nelson Circuit Court in the interim to reconsider and set aside the Contempt Orders and underlying Settlement Agreement and related Orders, the Petitioner filed a Civil Rule 60.02(d)(f) Motion for an Evidentiary Hearing. That rule provides in part:

> "On Motion, a Court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order or proceeding upon the following grounds: ... (d) fraud affecting the proceedings other than perjury or falsified evidence; ... or (f) any other reason of an extraordinary nature justifying relief."

The Motion only needs to be made within a reasonable time not more than one year after the judgment, order or proceeding was entered

or taken. In support of the Motion, the Affidavit of the Petitioner was filed explaining why he did not attend the hearing of March 27, and addressing his concerns with regard to the potential civil and criminal liability under Federal and State Tax Law, which he had also placed on the record on prior occasions by Affidavit and supporting documents. At the Motion Hour on August 19 to set a hearing, an Affidavit by a Certified Public Account in support of the Petitioner's position was filed with the Court.

At that time, the Court entered another Calendar Order which states, "Motion for evidentiary hearing denied until such time as the Court of Appeals sets aside the Contempt Order and Mr. Charles Monin satisfies the Contempt Order." The Court orally added "I'm not going to hear anything as long as Mr. Monin is in contempt." The Court added that it was not going to grant the Petitioner any relief until the Court of Appeals rules on the

contempt matter and sets aside the same. When counsel attempted to demonstrate to the Court that an Evidentiary Hearing would satisfy the Court that the Settlement Agreement and related Orders should be set aside, which was the underlying basis for the Contempt Orders, and that the Petitioner, contrary to the Court's belief, was unaware of the Order requiring him to personally attend the hearing, the Court's response was that the Petitioner was aware of the hearing. Finally, the Court reiterated that it would do nothing for the Petitioner until the Court of Appeals says "I have to."

As a result, the Second Notice of Appeal based on the denial for a request for an Evidentiary Hearing under Civil Rule 60.02(d)(f) was filed on September 2, 1992 well within the thirty day time limit set out, supra. Both appeals were consolidated pursuant to an Order of the Court of Appeals of October 2, 1992.

Civil Rule 61.02 of the Civil Rules of Kentucky provides as follows with regard to preserving issues on appeal:

> "Rule 61.02 Substantial Error:
> A palpable error which affects the substantial rights of a party may be considered by the Court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice resulted from the error."

The same due process argument being raised before this Honorable Court was raised on appeal to the Court of Appeals directly with the underlying question of whether or not the State Judge has power to order a party to act contrary to Federal Law being briefed and argued before the Court of Appeals of the Commonwealth of Kentucky which rendered its Opinion entered July 2, 1993.

The Petitioner's Motion for Discretionary Review by the Supreme Court was denied on November 17, 1993.

Appended to this Petition are the Orders and Opinions of the Court of Appeals of the Commonwealth of Kentucky and the Supreme Court of Kentucky; the Orders of Contempt of the Nelson Circuit Court; and the Calendar Orders of the Nelson Circuit Court denying Civil Rule 59 and Civil Rule 60 relief.

REASONS FOR ALLOWANCE OF THE WRIT

Under the Supremacy Clause of the Constitution of the United States, Federal Tax Law takes precedence over State Law, which includes judicial decisions, and prohibits a State Judge from entering any Order which compels a party to act contrary to federal law.

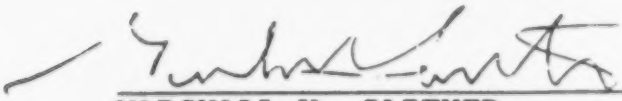
Without relief from this Honorable Court, the Petitioner will be deprived of his liberty unless he purges himself of the Contempt Orders by transferring the stock of Monin, Inc. to the Respondent heirs. By so doing, the Peitioner will have acted in violation of Federal Estate Tax Law. The tax liability of the estate has not been paid to the United States Government

which primarily comes from the assets of the Estate. Furthermore, in his joint capacity as an restored co-executor and heir, the Petitioner is personally liable for taxes, interest and penalties due and is subject to criminal prosecution for failing to comply with Federal Estate Tax Law.

The Trial Court and the Appellate Courts of the Commonwealth of Kentucky have denied the Petitioner a full, fair opportunity to be heard in response to contempt proceedings and in mitigation of the Contempt Orders. Furthermore, the Petitioner has been held in contempt without sufficient notice as established by a State Court Order and was denied assistance of counsel during the Show Cause proceedings why he should not be held in contempt. All of the above constitutes denial of his right to due process and his right to counsel and constitutes an improper deprivation of his liberty under the Fifth, Sixth and Section One of the Fourteenth Amendments of the

Constitution of the United States. Given the circumstances, the Petitioner has no other resort than review by this Honorable Court on his Petition for Writ of Certiorari.

Respectfully submitted,



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Counsel of record for
Petitioner

CASE NO. 83CI-261 NELSON CIRCUIT COURT
CHARLES MONIN, ET AL PLAINTIFFS
VS.
JOSEPH E.MONIN, ET AL DEFENDANTS

AND

CASE NO. 83CI-242 NELSON CIRCUIT COURT
THELMA MONIN, ETC., ET AL PLAINTIFFS
VS.
CHARLES K.MONIN, JR. DEFENDANTS

AND

CASE NO. 85CI-021 NELSON CIRCUIT COURT
CHARLES MONIN, ET AL PLAINTIFFS
VS.
JOSEPH E. MONIN, ET AL DEFENDANTS

AND

CASE NO. 87-CI-073 NELSON CIRCUIT COURT
DONALD LEO MONIN, ET AL PLAINTIFFS
VS.
PAUL B. MONIN,ET AL DEFENDANTS

AND

CASE NO. 90-CI-161 NELSON CIRCUIT COURT
CHARLES KELM MONIN,JR.,ET AL PLAINTIFFS
VS.
PAUL BALLARD MONIN,ET AL DEFENDANTS

AND

CASE NO. 84-P-140 NELSON DISTRICT COURT
ESTATE OF THELMA MONIN, DECEASED
AND
CASE NO. 87-P-028 NELSON DISTRICT COURT
ESTATE OF CHARLES K. MONIN, SR., DECEASED

* * * * * * *

ORDER HOLDING IN CONTEMPT AND FOR ARREST

This cause coming on for hearing on this date and Charles K. Monin, Jr. not present, and it appearing at this time and on this date, and that the Court has heretofore orally and by order required the carrying out of all things necessary to affect the settlement agreement heretofore made February 3, 1991, and Mr. Charles K. Monin, Jr. not present and had no reason for his failure to do so, HE IS HEREBY HELD IN CONTEMPT OF COURT.

The Sheriff of Nelson County IS HEREBY ORDERED to arrest Charles K. Monin, Jr. and incarcarate him in the Nelson County Jail for a period of thirty (30) days or until he does the steps necessary to carry out the settlement agreement of February 3, 1991.

This 27th day of March, 1992.

Larry D.Raikes,
JUDGE, NELSON CIRCUIT COURT
Entered: 3/27/92

CASE NO. 83CI-261 NELSON CIRCUIT COURT
CHARLES MONIN, ET AL PLAINTIFFS
VS.
JOSEPH E.MONIN, ET AL DEFENDANTS

AND

CASE NO. 83CI-242 NELSON CIRCUIT COURT
THELMA MONIN, ETC., ET AL PLAINTIFFS
VS.
CHARLES K.MONIN, JR. DEFENDANTS

AND

CASE NO. 85CI-021 NELSON CIRCUIT COURT
CHARLES MONIN, ET AL PLAINTIFFS
VS.
JOSEPH E. MONIN, ET AL DEFENDANTS

AND

CASE NO. 87-CI-073 NELSON CIRCUIT COURT
DONALD LEO MONIN, ET AL PLAINTIFFS
VS.
PAUL B. MONIN,ET AL DEFENDANTS

AND

CASE NO. 90-CI-161 NELSON CIRCUIT COURT
CHARLES KELM MONIN,JR.,ET AL PLAINTIFFS
VS.
PAUL BALLARD MONIN,ET AL DEFENDANTS

AND

CASE NO. 84-P-140 NELSON DISTRICT COURT
ESTATE OF THELMA MONIN, DECEASED
AND
CASE NO. 87-P-028 NELSON DISTRICT COURT
ESTATE OF CHARLES K. MONIN, SR., DECEASED

* * * * * * *

SUPPLEMENTAL ORDER

This matter having come on for hearong on March 27, 1992 and an order having been entered on that date,it is hereby ordered and adjudged as follows:

1. That Charles K. Monin, Jr. shall be incarcerated for a period of thirty days or until he does the steps that he can do necessary to carry out the settlement agreement of February 3, 1991.

2. Motion having been made for bond pending an appeal of the Order entered on March 27th as supplemented herein, said motion be and the same is hereby denied.

Larry D.Raikes,
JUDGE, NELSON CIRCUIT COURT
Entered: 3/30/92

CIVIL REVIEW DOCKET (NON-DOMESTIC)
AOC-950
11-87 Date: August 19, 1992
Commonwealth of Kentucky Time: 9:00 a.m.
Court of Justice

CALENDAR

Nelson Circuit Court - Larry D. Raikes, Judge

Case No.	Style
1. 83-CI-242	THELMA MONIN, ET AL Atty. John Saltsman, Jr. vs. CHARLES K. MONIN, JR., ET AL Atty. John Hubbard
2. 83-CI-261	THELMA MONIN Atty. John W. Saltsman, Jr. vs. CHARLES K. MONIN, JR.,ET AL Atty. John Hubbard
3. 87-P-028	CHARLES KELM MONIN, SR. Atty. Challen McCoy
4. 84-P-140	THELMA BALLARD MONIN (TESTATE) Atty. Challen P. McCoy
5. 90-CI-161	CHARLES K. MONIN, JR. ET AL Atty. John D. Hubbard vs. PAUL BALLARD MONIN, ET AL Atty. John S. Kelley, Jr.
6. 87-CI-073	DONALD LEO MONIN Atty. John D. Hubbard vs. PAUL B. MONIN, ET AL Atty. Challen P. McCoy

7. 85-CI-021 CHARLES MONIN, ET AL
Atty. John Hubbard
vs.
JOSEPH E. MONIN, ET AL
Atty. John S. Kelley

CHARGES OR CLAIM:
1. EVIDENTIARY HEARING
2. EVIDENTIARY HEARING
3. EVIDENTIARY HEARING
4. EVIDENTIARY HEARING
5. EVIDENTIARY HEARING
6. EVIDENTIARY HEARING
7. EVIDENTIARY HEARING

PROCEEDINGS:
1-7: Motion for evidentiary hearing denied until such time as Court of Appeals sets aside Contempt Order or Mr. Charles Monin satisfies Contempt Order.
ENTERED: 1/19/92 DIANE THOMPSON, Clerk
Nelson Circuit & District Courts
By: Deputy Clerk

CIVIL REVIEW DOCKET (NON-DOMESTIC)
AOC-950
11-87 Date: August 19, 1992
Commonwealth of Kentucky Time: 9:00 a.m.
Court of Justice

CALENDAR

Nelson Circuit Court - Larry D. Raikes, Judge

Case No.	Style
8. 83-CI-242	THELMA MONIN, ET AL Atty. Saltsman, Jr. vs. CHARLES K. MONIN, JR. Atty. Hubbard

CHARGES OR CLAIM:

PROCEEDINGS:

Motion to remove Charles K. Monin overruled.
Motion to vacate contempt order overruled.
Emergency order to be entered (last word is illegible).

ENTERED: 5/13/92
DIANE THOMPSON, CLERK
Nelson Circuit & District Court
By: Deputy Clerk

RENDERED: JULY 2, 1993; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NOS. 92-CA-1506-MR, 92-CA-1507,
92-CA-1508-MR, 92-CA-1509-MR,
92-CA-1510-MR, 92-CA-1511-MR,
AND 92-CA-1512-MR

CHARLES K. MONIN, JR. APPELLANT

vs. APPEALS FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NOS. 83-CI-242, 83-CI-261,
85-CI-21, 87-CI-73, 90-CI-161, 84-PO-140
and 87-PO-28

JOSEPH E. MONIN; JAMES A. MONIN;
THOMAS RAPHAEL MONIN, MARTHA WHEELER;
WILLIAM MONIN; CAROLYN BACKHERMS;
LINDA ROBY; PAUL MONIN; DONALD MONIN;
MONIN, INC.; SONNY MONIN, INC.; CHARLES
K. MONIN, SR.; THELMA MONIN; AND THE
ESTATES OF CHARLES K. MONIN, SR. AND
THELMA MONIN, DECEASED APPELLEES

AND NOS. 92-CA-2165-MR, 92-CA-2166-MR,
92-CA-2167-MR, 92-CA-2168-MR,
92-CA-2169-MR, 92-CA-2170-MR, and
92-CA-2171-MR

CHARLES K. MONIN, JR. APPELLANT

V. APPEALS FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NOS. 83-CI-242, 83-CI-261,
85-CI-21, 87-CI-73, 90-CI-161,
84-PO-140 and 84-PO-28

JOSEPH E. MONIN, JAMES A. MONIN;

THOMAS RAPHAEL MONIN; MARTHA WHEELER; WILLIAM MONIN; CAROLYN BACKHERMS; LINDA ROBY; PAUL MONIN; DONALD MONIN; MONIN, INC.; SONNY MONIN, INC.; CHARLES K. MONIN, SR.; THELMA MONIN; THE ESTATES OF CHARLES K. MONIN, SR., AND THELMA MONIN, DECEASED; CHALLEN P. McCOY; JOHN DOUGLAS HUBBARD; JOHN SALTSMAN; JOHN S. KELLEY; HANDMAKER & SEILLER; KELLEY & KELLEY; SALTSMAN & WILLETT; BEN HAYDON; TERRY HAWKINS OF MORRIS, SILVERTHORN & DUTTON; FULTON, HUBBARD & HUBBARD; McCOY & SEAY; J.C. GREENWELL; MS. J.C. GREENWELL; BROWN, TODD & HEYBURN; BILL BROWN; AND THEIR ASSIGNS, SUCCESSORS, PARTNERS AND PROFESSIONAL FIRMS APPELLEES

OPINION AND ORDER

DISMISSING APPEALS NOS. 92-CA-1506-MR 92-CA-1507-MR, 92-CA-1508-MR, 92-CA-1509-MR, 92-CA-1510-MR, 92-CA-1511-MR, and 92-CA-1512-MR

AFFIRMING APPEALS NOS. 92-CA-2165-MR, 92-CA-2166-MR, 92-CA-2167-MR, 92-CA-2168-MR, 92-CA-2169-MR, 92-CA-2170-MR and 92-CA-2171-MR

* * * * * * * * * * * * * * * * *

BEFORE: Howerton, Johnston & Wilhoit, Judges.

JOHNSTONE, JUDGE: These fourteen consolidated appeals represent but the latest chapter in a saga of litigation that over a span of ten years has consumed the Monin

family and exhausted the patience of the Nelson Circuit Court. We are admittedly at a loss as to why appellant chose to file fourteen separate actions in this Court as resolution of the matter before us centers upon a single issue: whether the circuit judge erred in holding appellant in contempt for his disregard of orders directing him to take the steps necessary to effectuate a settlement agreement disposing of two probate matters and five civil suits. Our careful review of this somewhat difficult and confusing record in light of the arguments presented convinces us that the purported appeals from the order entered March 27, 1992 are untimely and that the decision of the trial judge on the CR 60.02 motion must be upheld.

The complex set of facts relative to the underlying litigation in this case is well known to the parties and will not be

reiterated except as necessary to an understanding of our opinion. Suffice it to say that as far as these appeals are concerned, the pertinent facts commence on February 3, 1991, with the execution by all parties of a settlement agreement disposing of all claims in the seven underlying legal matters. Under the terms of this agreement (which, contrary to appellant's statement in his brief, is included in the record on appeal as an attachment to a motion filed on August 26, 1991), appellant was required to take certain steps in the form of transferring stock, incorporation of a new company and closing the parties' father's estate. Appellees first moved to compel appellant to carry out the terms of the agreement on May 20, 1991. At the hearing on this motion, appellant raised concerns about potential tax liabilities that he might incur resulting from what he alleged was an

undervaluation of Monin, Inc., stock. The trial judge, citing appellant's refusal to perform his duties as co-executor of his father's estate, ordered that appellee Joseph E. Monin be empowered to settle the estate without the participation of appellant.

In July, 1991, appellant was ordered to refrain from any interference with the survey of land owned by Monin, Inc. That order included a provision stating that any violation of the order would be punishable by contempt. Appellees then filed motions dated August 26, 1991, and September 5, 1991, again seeking compliance with the terms of the agreement. On December 6, 1991, a hearing was conducted at which appellant repeated his concerns over federal estate tax problems. The trial judge directed all parties to do everything they had agreed to do and clearly stated that anyone violating the order risked the sanction of jail. By order dated December 23, 1991, the trial judge mandated

compliance with the settlement agreement within thirty days.

Appellees' next motion to compel appellant to perform his obligations under the settlement agreement resulted in an order dated March 25, 1992, requiring appellant's personal attendance at a hearing set for March 27, 1992, "for the purpose of determining whether they [appellant and his brother Donald] should be held in contempt of court for failure to carry out the judgment heretofore ordered done." Appellant failed to attend the hearing on that date and his counsel who was present stated that he no longer represented appellant individually, but only in his capacity as co-executor. Counsel did advise the court, however, that appellant was aware of the hearing. An order finding appellant in contempt was issued that same date. A subsequent supplemental order denying bond was entered on March 30, 1992

and on May 7, 1992, the trial judge denied appellant's CR 59 motion. This order was entered of record May 13, 1992.

Appellant filed the first seven notices of appeal on June 12, 1992, from the orders entered March 27, 1992, March 30, 1992, and May 13, 1992, holding appellant in contempt and denying his motion for CR 59 relief. An immediate stay of the contempt order was entered by this Court on July 2, 1991 and on August 31, 1992, appellant was granted a stay pending appeal.

On August 7, 1992, appellant filed in the circuit court a CR 60.02 motion requesting an evidentiary hearing, accompanied by an affidavit explaining his failure to attend the March 27, 1992 hearing and again addressing his concerns about potential civil and criminal liability under federal and state tax laws. At a hearing on August 19, 1992, the trial judge stated that

he would not hear anything as long as appellant was in contempt and declined to grant appellant any relief until the Court of Appeals resolved the contempt matter. Not surprisingly, this ruling precipitated the second series of notices of appeal which were consolidated with the previous appeals by order of this Court on October 2, 1992.

As a preliminary matter, we must address the timeliness of the notices of appeal filed June 12, 1992. Appellant correctly acknowledges that the timeliness of these notices of appeal is dependent upon the timeliness of his CR 59 motion filed on April 10, 1992. Unfortunately, we are constrained to hold that the CR 59 motion was not timely as to the order of contempt entered March 27, 1992. Although the CR 59 motion was timely as to the order entered March 30, 1992, that supplemental order did no more than make reference to the order of contempt entered March 27, 1992, and deny bond pending appeal.

It cannot legitimately be construed as in any way modifying the previous contempt order, nor more importantly, as extending the time for moving to alter or amend the order of contempt. The language of the March 30, 1992 order is far too clear to admit of any other interpretation. With the failure of the CR 59 motion to stop the time for filing a notice of appeal, the decision of the circuit judge became final 30 days after March 27, 1992. The appeals based upon the June 12, 1992 notice of appeal must, therefore, be dismissed.

Turning our attention to the appeals based upon appellant's CR 60.02 motion for relief from the order requiring compliance with the settlement agreement and from the order of contempt, we find no basis for disturbing the denial of the requested relief. Noticeably absent from the litany of proceedings in the circuit court after

execution of an agreement intended to put this litigation to rest is any motion to set the settlement aside on the basis of fraud, mistake or any other legally acceptable reason. We cannot fault the trial court's understandable reluctance to conduct an evidentiary hearing under CR 60.02 on matters that appellant had every opportunity to bring before the trial judge by appropriate motion for at least thirteen months prior to being held in contempt, but for some unknown reason chose not to. Merely voicing vague "concerns" in response to repeated motions to compel compliance was, in our view, clearly insufficient. As stated in Schott v. Citizens Fidelity Bank & Trust Company, Ky. App., 692 S.W.2d 810, 814 (1985), "...the determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial judge with one of the chief factors guiding it being the moving party's ability

to present his claim prior to the entry of the order sought to be set aside." It borders on the frivolous to suggest that appellant had no such opportunity in this case.

Finally, appellant mentions in his brief, but does not directly argue, that he was not served with notice of the March 27, 1992 hearing. Appellant directs us to no authority to support the proposition that actual notice of the contempt hearing is inadequate for due process purposes. It is undisputed that appellant's counsel of record had actual notice that his client's attendance was required. Appellant admits in his affidavit that he was aware of the hearing and had informed his counsel that he intended to be present, but chose not to attend due to an unanticipated business problem. We find appellant's contention that he was unaware that his personal attendance

was required to be, at best, disingenuous when his pattern of conduct in response to direct orders of the court can be described only as flagrant disregard. It must be emphasized that the order of contempt was predicated not only on appellant's failure to appear, but also upon his repeated refusal to effectuate the agreemnt as directed by the court. There is simply no question but that the trial judge's oral directive to appellant's counsel that his client be present on March 25, 1992 , followed by a written notice to counsel of record constituted legally sufficient notice of the contempt hearing to satisfy due process. See Am. Jur. 2d, Contempt Section 284 and Annotation; Sufficiency of notice to, or service upon, contemnor's attorney in civil contempt proceedings, 60 A.L.R.2d 1244.

Appeals numbers 92-CA-1506-MR through 92-CA-1512-MR are hereby DISMISSED. The

judgment in appeals n umbers 92-CA-2165

through 92-CA-2171-MR are AFFIRMED.

ENTERED: July 2, 1993 Martin E. Johnstone
Judge, Court of Appeals

ALL CONCUR.

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SUPREME COURT OF KENTUCKY
93-SC-547-D
(92-CA-1506; 92-CA-1507;
92-CA-1508; 92-CA-1509;
92-CA-1510; 92-CA-1511
AND 92-CA-1512)

CHARLES K. MONIN, ETC. MOVANT

NELSON CIRCUIT COURT
83-CI-242; 83-CI-261;
85-CI-21; 87-CI-73;
90-CI-161; 84-P-140;
AND 87-P-28

JOSEPH E. MONIN, ET AL RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied. The motion for intermediate and emergency relief pursuant to CR 76.33 is denied as moot.

ENTERED November 17, 1993.

Robert F. Stephen
Chief Justice